Supreme Court, U.S.
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No. 02-183

IN THE

Supreme Court of the United States

CHARLES MICHAEL PRATER, *et al.*,

Petitioners,

v.

CITY OF BURNSIDE, KENTUCKY,
A Municipal Corporation, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Free Exercise Clause protects a religious institution's desire to fulfill what it perceives as its spiritual duty to construct facilities on a dedicated public roadway.

PARTIES TO THE PROCEEDING

The identity of the Petitioners have been accurately set forth in the Petition.

The Respondents in this action consist of: the City of Burnside, Kentucky; Richard M. Sadler, as past Mayor of the City, who as of January 2002 was replaced by Delores Sizelove, current Mayor; Conard Bryant, Member of the City Council at the time of the filing of this litigation who as of January, 1999, was replaced by Edgar Hargis, Jr.; Henry D. Coffey, Member of the City Council; Emma Branum, Member of the City Council at the time of the filing of this litigation who as of January, 1999, was replaced by Joyce Gregory; Dean Lovins, Member of the City Council; Delores Sizelove, Member of the City Council at the time of the filing of this litigation who as of January 2002 became Mayor; and David R. Brummett, Jr. Member of the City Council at the time of the filing of this litigation who as of January 2001, was replaced by John Richardson; James Rasnick, member of the City Council, occupying the seat vacated by Delores Sizelove.

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STATEMENT OF THE CASE

The facts of the case are stated fully in the decisions of the District Court (Petitioner's Appendix B, at 28a-29a, and Petitioner's Exhibit C, at 38a-41a) and the Court of Appeals (Petitioner's Appendix A, at 2a-6a) *Prater v. City of Burnside, Ky*, 289 F.3d 417, at 422-25 (2002).

REASONS FOR DENYING THE PETITION

THE CHURCH HAS FAILED TO ESTABLISH A VIOLATION OF ANY OF ITS CONSTITUTIONAL RIGHTS, AND ABSENT SUCH A VIOLATION, THE "HYBRID-RIGHTS" THEORY FAILS.

The issue presented herein is whether the City's development of, and its refusal to close, a valid and lawfully existing municipal street is a violation of the Church's rights under the Free Exercise, Free Speech, and Freedom of Assembly Clauses of the First Amendment, or constitute an impermissible "taking" under the Takings Clause of the Fifth Amendment.

1. No Violation of First Amendment.

Main Street Baptist Church (hereinafter the "Church") claims that the City of Burnside, Kentucky (hereinafter the "City"), by failing to close a portion of one of its municipal streets known as "Summit Avenue," prevented the Church from enlarging its facilities to accommodate its parishioners who seek to exercise their rights of assembly and expression. This case does not, however, involve the Church's right to freely engage in religious practices. The Church's freedom to worship, speak, and assemble are not being violated by the City's actions or inactions. The Church maintains that

the City's actions somehow infringe upon the desire of the Church to construct buildings upon municipal property. However, the First Amendment does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs, are violative of the First Amendment. The crucial word in the Constitutional text is "*prohibit*," not "*infringe*". *Lyng v. N.W. Indian Cemetery Prot. Asso.*, 485 U.S. 439, 99 L. Ed. 2d 534 at 547-48, 108 S. Ct. 1319 (1988). Although some citizens may find certain government activities incompatible with their own search for spiritual fulfillment and with the tenets of their religion, the First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs or activities that do not prohibit the free exercise of religion. *Lyng*, 99 L. Ed. 2d at 548. The Federal Constitution's First Amendment is not to be interpreted as being directed against any form of government action that merely frustrates or inhibits religious practice. *Id.*

None of the Church's rights are being violated by the City's actions or inactions. What may be said to have been "burdened" is the Church's attempt to close a valid, lawfully existing roadway in order to construct Church facilities thereupon, and this is neither accorded nor afforded Constitutional protection. In seeking to close Summit Avenue, the Church is attempting to adversely acquire public property, so that it will thus obtain a larger, undivided tract of land, adjacent to U.S. Highway 27, thereby increasing the value of the Church's real estate holdings. The Church's conduct is not protected by the First Amendment. "The Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual

can exact from the government." *Sherbert v. Verner*, 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963). The City's actions do not operate as a denial, a prohibition, nor even an infringement of the protected and sacred rights of the Church. The Church is merely being "denied" its efforts to acquire government property, which the Church maintains could be better used for the conducting of religious activity. The rights of the Church and its Members to worship, speak, and practice their religious beliefs have been neither violated nor burdened. Neither the City's actions nor inactions constitute burdens on the exercise of religion. There is no Constitutionally protected activity or practice of the Church that is being prohibited or even burdened by the City. The District Court correctly dismissed the Church's Free Exercise Claims, and the Court of Appeals affirmed the dismissal. The writ should be denied.

2. *No Deprivation of any Cognizable Property Right or Liberty Interest.*

Main Street Baptist Church claims that it has been deprived of liberty and property without due process of law. The District Court disagreed and granted Summary Judgment in favor of the City of Burnside, and determined that the Church failed to establish a property interest in Summit Avenue (Petitioner's Appendix C, 38a-47a), and that the Church failed to establish that it was being deprived of a liberty interest within the meaning of due process. (Petitioner's Appendix B, 27a-37a). As such, the Due Process Clause was inapplicable to the Church's claims. The Court of Appeals unanimously upheld the Summary Judgment.

Claims of denial of Constitutionally required due process must be analyzed in two stages: first, whether there was a cognizable property or liberty interest of which the claimant suffered deprivation, *Board of Regents v. Roth*, 408 U.S. 564,

92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), and second, what procedural steps are necessary to satisfy due process under the circumstances. *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The City maintains that the Church failed to meet the first requirement, in that there was no recognizable property right or liberty interest of which the Church has been deprived.

The Church bears the burden of demonstrating that it has a cognizable property or liberty interest, of which it is being deprived without due process. Only upon a showing that the Church has such a cognizable property or liberty interest will the inquiry shift to whether procedures that terminated such interest comported with due process. *Maust v. Headley*, 959 F.2d 644 (7th Cir. 1992).

The absence of any First Amendment claim or other liberty interest was found by both the District Court and the Court of Appeals, and was discussed hereinabove.

The Church claims that it is being deprived of a "property right," thus entitling it to the protections of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. As the Supreme Court has noted,

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . . *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972)

The Court of Appeals correctly found that the Church had not been deprived of any property interest, as the Church

had no ownership interest in Summit Avenue. (Petitioner's Appendix A, at 8a-9a). As the Court of Appeals explained, . . . "any reversionary property interest that the Church might have in Summit Avenue Extended is subject to the City's superior right to develop the dedicated roadway for a public purpose." (Petitioner's Appendix A, at 22a.). The only "property interest" or liberty interest claimed by the Church was the opportunity to develop Church facilities upon Summit Avenue, or at least the desire to have the street closed so that it would not interfere with the Church's planned development of its property. To establish a legitimate claim of property interest, more is required than a claimant's abstract need or desire. It has been held that a claimant has no cognizable property interest in a "contemplated development of property." *Marshall v. Bd. Of Cty Com'rs for Johnson Cty.*, 912 F. Supp. 1456 (D. Wyo. 1996). A desire for the closure of a lawfully existing street, merely because its existence frustrates an individual's plan of property development, is not an interest that is or should be recognized or protected. The Court of Appeals correctly found that the Free Exercise Clause did not protect a religious institution's desire to "fulfill what it perceives as its spiritual duty to construct facilities on a dedicated public roadway. . . ." *Prater v. City of Burnside, Ky*, 289 F.3d 417 at 427. (Petitioner's Appendix A, at 13a.).

Main Street Baptist Church has not been deprived of any liberty interest. The term "liberty" does not extend limitlessly to every conceivable individual interest that might impinge on one's pursuit of happiness in a free society, but instead derives meaning from existing rules or understandings that stem from an independent source such as state law. *Roth*, 408 U.S. 564.

There has been no deprivation of the Church's property rights or "liberty interests" within the meaning of the Due Process Clause. The Writ should be denied.

3. This is not a case involving a "hybrid rights" claim.

The Church has filed a 56 page Petition in a case in which the Court of Appeals states the issue to be "Whether the Free Exercise Clause protects a religious institution's desire to fulfill what it perceives as its spiritual duty to construct facilities on a dedicated public roadway. . . . " *Prater v. City of Burnside, Ky*, 289 F.3d 417 at 427. (Petitioner's Appendix A, at 13a). The Church has taken five sentences of dicta contained in one paragraph of the Court of Appeals opinion, and argues that such language "directly conflicts" with opinions issued in others Circuits. The only discussion of the "hybrid rights" argument in the Court of Appeal's opinion follows the Court's conclusion that the development of Summit Avenue and the City's subsequent refusal to close the roadway in no way implicated the Church's rights under the Free Exercise Clause:

> This conclusion also disposes of the Church's claim that the City violated its "hybrid rights," a term that the Church uses to describe a combination of its rights under the Free Exercise, Free Speech, and Freedom of Assembly Clauses of the First Amendment, as well as the Takings Clause of the Fifth Amendment. The Church argues that the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), establishes that strict scrutiny applies where a government act implicates a combination of both the right to the free exercise of religion and any other fundamental constitutional right.

> But absent a violation of the Free Exercise Clause, the Church's hybrid-rights theory necessarily fails. Furthermore, as explained above in Part II.B.1., the Church has not shown that a genuine issue for trial exists regarding any violation of the Takings Clause. Nor does the Church offer any legal authority or compelling argument to explain how the City's refusal to allow the Church to expand its facilities on a dedicated public roadway implicates either the Free Speech or Freedom of Assembly Clauses. Finally, this court has rejected the "assertion that the Supreme Court established in *Employment Division v. Smith* that laws challenged by hybrid rights claims are subject to strict scrutiny." *Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton*, 240 F.3d 553, 561 (6th Cir.), *cert. granted*, 122 S. Ct. 392 (2001).

Prater v. City of Burnside, Ky, 289 F.3d 417, at 430.

Under the hybrid rights doctrine, a claimant may establish a violation of the First Amendment free exercise clause, even in the case of a neutral law of general applicability, by showing that the challenged governmental action compromises both the right to the free exercise of religion and an independent constitutional right. However, a cognizable hybrid rights claim will not arise where either the free exercise claim or the claim of an independent constitutional right is insubstantial. *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 104 Ed. Law Rep. 106 (1st Cir. 1995) *cert. denied*, 516 U.S. 1159, 116 S. Ct. 1044, 134 L. Ed. 2d 191; *Jensen v. Reeves*, 45 F. Supp. 2d 1265,

135 Ed. Law Rep. 447 (D. Utah 1999); *Swanson By and Through Swanson v. Guthrie Independent School Dist. No. I-L*, 135 F.3d 694, 123 Ed. Law Rep. 1087 (10th Cir. 1998).

There does not appear to be any conflict with the Court of Appeals decision in this case and with those decisions reached by other Circuits. The Ninth Circuit has held that, to assert a hybrid rights claim, a free exercise litigant must make out a "colorable claim" that a companion right has been violated—that is, a "fair probability" or a "likelihood," but not a certitude, of success on the merits. *Miller v. Reed*, 176 F.3d 1202, 163 A.L.R. Fed. 739 (9th Cir. 1999). The Tenth Circuit, in *Swanson By and Through Swanson v. Guthrie Independent School Dist. No. I-L*, 135 F.3d 694, 123 Ed. Law Rep. 1087 (10th Cir. 1998) commenting that the case illustrated the difficulty of applying the hybrid rights exception of *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), declared that whatever the Smith hybrid-rights theory may ultimately mean, it at least requires a "colorable" showing of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right, such as the right to control the education of one's child.

In the case at bar, Main Street Baptist Church has failed to demonstrate at least a colorable showing of infringement of any recognized and specific constitutional right, much less has it asserted an independently viable claim to a constitutional right other than the right to the free exercise of religion, required by other Circuits. *See, e.g., Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 104 Ed. Law Rep. 106 (1st Cir. 1995). As the Court of Appeals noted, the Church has failed to "offer any legal authority or

compelling argument to explain how the City's refusal to allow the Church to expand its facilities on a dedicated public roadway implicates either the Free Speech or Freedom of Assembly Clauses." The Church's claim does not fail merely because it is neither "viable" nor "colorable," but rather it fails because it is nonexistent. Regardless of whether the Circuits may have different requirements upon a litigant to make a showing of an infringement to a constitutional right, the Church has failed to make at least a colorable showing of infringement of any recognized and specific constitutional right or other liberty interest in its mere desire to fulfill what it perceives as its spiritual duty to construct facilities on a dedicated public roadway. The case at bar is not representative of a true conflict in the opinions of the Circuits, and the Writ should be denied.

The decisions below are clearly correct. The petitioner argues that the Sixth Circuit's position with respect to hybrid rights analysis conflicts with those of other circuits, but fails to establish how the Church has suffered any infringement to its rights under the Free Exercise Clause. Further, there is no important question of constitutional law requiring review by this Court. For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

CONCLUSION

Respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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